Supreme Court, U.S.
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No. 04- 04 552

In the Supreme Court of the United States

MORTON L. GINSBERG,

Petitioner,

v.

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the Fourth Circuit err in holding that the Maryland service requirements of F. R. C. P. Rule 4(k)(1)(A) need not be complied with to establish personal jurisdiction in a United States District Court in Maryland over a New York resident in a diversity case as to which Maryland law applied?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are set forth in the case caption. Petitioner is unaware of any publicly traded company owning Neighborhood Development Collaborative.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding and
Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Statement of Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

I. Overview of the Case 2

II. Background of the Case 2

III. Proceedings Below 2

Reasons for Granting the Petition 3

Conclusion 5

Appendix

Appendix A
United States Court of Appeals for the Fourth Circuit
Per Curiam Opinion Dated July 22, 2004 . . . . . 1a

Appendix B
In the United States District Court for the District of
Maryland Memorandum Opinion and Judgment Order
Dated September 2, 2003 . . . . . 3a

TABLE OF AUTHORITIES

Cases **Page**

Hauver v. Dorsey, 228 Md. 494 (1962) 4

Wade v. Danek Medical, 182 F. 3d 281 (4th Cir. 1999) 4, 5

Walker v. Armco Steel Corp., 446 U. S. 740 (1980) 4, 5

Statutes

28 U. S. C. §1254 (1) 1

Rules

Federal Rules of Civil Procedure, Rule 3 4

Federal Rules of Civil Procedure, Rule 4(k)(1)(A) 1-4

Maryland Rule 2-114(b) 3

Maryland Rule 2-321(b) 3

Supreme Court Rule 10 3

OPINIONS BELOW

The July 22, 2004 opinion of the United States Court of Appeals for the Fourth Circuit is not reported but is reprinted at App. 1a – 3a; the Maryland District Court's opinion and order is not reported but is represented at App. 4a-10a..

STATEMENT OF JURISDICTION

The Fourth Circuit issued its opinion on July 22, 2004. This petition for certiorari is timely in that Petitioner has filed it within 90 days of July 22, 2004. The Court has jurisdiction pursuant to 28 U. S. C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Federal Rules of Civil Procedure, Rule 4(k)(1)(A).

Civil Procedure Rule 4 (k)(1)(A) provides:

> (k) Territorial Limits of Effective Service.
>
> (1) Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant
>
> (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located.

STATEMENT OF THE CASE

I. Overview of the Case

The Fourth Circuit panel, in a one page opinion, affirmed per curiam without any discussion of the jurisdictional issue raised both in the District Court and the Circuit Court.

II. Background of the Case

The Petitioner as lender, and the Respondent as borrower, entered into a collateralized loan arrangement regarding a mortgage on Maryland property. The Respondent defaulted on the terms of the loan agreements and a dispute as to the effect of such default was litigated in the Maryland District Court as a result of litigation brought by the defaulted borrower, the Respondent.

The Petitioner has asserted throughout the litigation that the U. S. District Court had no jurisdiction over the Petitioners by reason of the Respondents failure to comply with Rule 4(k)(1)(A) of the Federal Rules of Civil Procedure. Neither the District Court nor the Fourth Circuit provided any reasons for their failure to apply Rule 4(k)(1)(A), and dismiss the case.

III. Proceedings Below

The opinions of the District Court and the Circuit Court, App. 1 through 11, reflect the proceedings below. The basis of Jurisdiction over the subject matter in the District Court is diversity of citizenship of the parties. It should be noted that the motion to dismiss on jurisdictional grounds over the person of the Petitioner was not decided by the District Court until final judgment, at which time the District Court ruled on

all outstanding matters, before any answer was due, and before the time for filing a jury request.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important question of federal law... that conflicts with relevant decisions of this Court." In addition the Court considers whether the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings...as to call for an exercise of this Court's supervisory power...."

Both of these considerations are present in this case.

Federal Rule 4(k)(1)(A) requires, in this type of case, that the jurisdictional requirements as to territorial limits for effective service of the state where the district court is located controls – i.e., Maryland law. The decisions below are unsound since Federal Rule 4(k)(1)(A) specifically requires that the service and summons be in accordance with Maryland law. This acts as a specific exception to the general 20-day answer rule (and there are other exceptions as well). However, since Federal Rule 4(k)(1)(A) specifically directs that state law applies, then that state's long-arm requirements and the state rules for summons and responding (60-day) are applicable. Maryland Rule 2-321(b) provides for a 60-day time to answer; and Maryland Rule 2-114(b) requires that the summons "contain" the "time within which the defendant must file a response to the complaint" Since the summons was incorrect as to the time designated, there was not only a failure to properly serve, but the papers that were attempted

to be served were defective and insufficient. The argument that somehow the Maryland rules are not Maryland "law" is rejected by Maryland courts. *Hauver v. Dorsey*, 228 Md. 494 (1962).

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) has relevance for resolving a conflict situation between Federal and State rules. In the *Walker* case, the Court had the question before it as to whether Federal Rule 3, which states that a civil action commences on the date of the filing of the Complaint overrides a state rule that provides that a civil action commences when service is first made upon the Defendant. (This issue, which arises in a number of States, has a bearing on the effect of the applicable statute of limitations.) The Supreme Court said the question was a difficult one and after extensive analysis determined that the State's rule as to when a case commences would control and override Federal Rule 3. Neither the District Court nor the Fourth Circuit responded to this argument.

In the case at bar, while a different Federal rule is involved, the same basic issue still exists that confronted the Supreme Court in *Walker v. Steel Corp.*, 446 U.S. 740 (1980). However, in the case at bar, the issue of resolving any conflict appears to be much more easily determined in view of the actual language of Federal Rule 4(k)(1)(A). Federal Rule 4(k)(1)(A) carves out an exception where Maryland long arm requirements must be met. Federal Rule 4(k)(1)(A) solves the supposed conflict by stating in so many words that you look to the state where the District Court sits to ascertain what a Court of General jurisdiction of that state (Maryland in this instance) would have to do to establish long arm jurisdiction. Further help in this analysis is *Wade v. Danek Medical*, 182 F.3d 281 (4th Cir 1999) where the Fourth Circuit (at 288-289) quoting in part from *Walker v. Armco*

Steel Corp., 416 U.S. 740, where it reasoned that it would look to state law not just for the applicable statute of limitations, but also for any rule, such as a service rule that constituted "an integral part of the state statute of limitations." See page 288, *Wade v. Danek*, supra.

The Fourth Circuit in *Wade v. Danek Medical*, 182 F. 3d 281 (4th Cir. 1999) made a point that a pivotal reason for favoring the state rule over the federal rule is to prevent forum shopping by a Plaintiff in a diversity action and to avoid an inequitable administration of the law. See footnote 10, page 288, *Wade v. Danek Medical*, supra. The difference of time to answer, 60 days for Maryland and 20 days for the Federal District Court, certainly will encourage forum shopping by plaintiffs if this case is upheld by the Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted. The territorial limits of service is an important issue. Forum shopping on State law issues, with diversity jurisdiction, should not be encouraged.

Respectfully submitted,

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October 2004

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03-2412, No. 04-1060

[Filed July 22, 2004]

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,
Plaintiff-Appellee,

v.

MORTON L. GINSBERG,
Defendant-Appellant.

DAVID F. ALBRIGHT,
Plaintiff-Appellant,

v.

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,
Plaintiff-Appellee,

and

MORTON L. GINSBERG,
Defendant.

Appeals from the United States District Court
for the District of Maryland, at Baltimore
(CA-03-1552-1-AMD)
Andre M. Davis, District Judge

Before TRAXLER, SHEDD, and DUNCAN, Circuit Judges.

PER CURIAM:

In Appeal No. 03-2412, Morton L. Ginsberg appeals the district court's order denying his motion to dismiss for lack of personal jurisdiction and granting summary judgment in favor of Neighborhood Development Collaborative ("NDC") in NDC's declaratory judgment action. Ginsberg also appeals the court's order denying his motion filed pursuant to Fed. R. Civ. P. 59(e). In Appeal No. 04-1060, Ginsberg's attorney, David F. Albright, appeals the district court's order imposing sanctions against him in the form of a reprimand. We have reviewed the parties' briefs and the joint appendix and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *See Neighborhood Dev. Collaborative v. Ginsberg*, No. CA-03-1552-1-AMD (D. Md. Sept. 2, 2003; Oct. 7, 2003; Nov. 22, 2003). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

No. AMD 03-1552

[Filed September 2, 2003]

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,
Plaintiff

v.

MORTON L. GINSBERG,
Defendant

MEMORANDUM OPINION

In this diversity case, plaintiff Neighborhood Development Collaborative ("NDC"), a District of Columbia corporation which builds, rehabilitates, and finances housing for moderate income residents in Maryland and elsewhere, seeks (primarily) declaratory and injunctive relief in respect to a promissory note and deed of trust held by defendant Morton L. Ginsberg, a citizen of New York, securing an indebtedness

of $850,000.[1] Pending before the court are Ginsberg's motion to dismiss based on alleged insufficiency of process and insufficiency of service of process, and NDC's motion for summary judgment. The motions have been briefed and no hearing is needed. The motion to dismiss shall be denied and the motion for summary judgment shall be granted.

The material facts bearing on both motions are undisputed. As to service of process, the record shows that a private process server entered Ginsberg's apartment building in New York for the purpose of serving Ginsberg with the summons and complaint in this action. Ginsberg came to the door of his apartment and spoke to the process server, but he would not open the door. When he learned that the process server was there to serve him with this lawsuit, Ginsberg threatened to call the police, apparently intending to imply that the process server was trespassing. In any event, upon Ginsberg's refusal to open the door to accept service, the process server attached the papers to the doorknob to Ginsberg's apartment and departed. Ginsberg retrieved the papers the next day. For the reasons stated by plaintiff in its memorandum opposing the motion to dismiss, and as a matter of law, the facts recited above reflect effective service of process.

Ginsberg also contends that, apart from *service* of process, the summons issued by this court is ineffective. According to Ginsberg, although the summons served upon him required that he file and serve his answer within 20 days of service of

---

[1] The Complaint also contains two claims for damages based on breach of contract theories, but I regard those claims as surplusage. If I am wrong and plaintiff truly intends to pursue those claims, then I shall reinstate them on motion.

process, as mandated by Fed.R.Civ.P. 12(a)(l)(A), because this case is based on diversity of citizenship jurisdiction, he was entitled to 60 days within which to file and serve his answer, the period that would have been available to Ginsberg had this case been instituted in a Maryland state court rather than in federal court. This frivolous contention is rejected. Accordingly, the motion to dismiss is denied.

On the merits, NDC contends that the applicable provisions of the relevant loan documents executed by the parties are unambiguous and must be interpreted as a matter of law consistent with NDC's interpretation of those provisions. I agree.

The key provision of the relevant loan documents relating to interest, costs or fees, or to payment terms, provides as follows:

> 3. Payment on the Loan. Borrower [NDC] shall pay to Lender [Ginsberg] the principal amount of the Loan [$750,000] on or before October 19, 2002 (the "Maturity Date"). Borrower shall additionally pay to Lender on or before the Maturity Date the sum of One hundred [sic] Thousand ($100,000) Dollars (the "Lump Sum Payment") as one lump sum payment of all interest, loan fees and costs on the Loan. Interest shall be earned on any sums not paid by the Maturity Date at the rate equal to thirty (30%) percent per annum. The Loan and the Lump Sum Payment may be prepaid at any time without premium or penalty.

A similar provision contained in the promissory note also requires the payment of interest at the rate of 30% per annum for all amounts unpaid as of the day after the Maturity Date. It is undisputed that no payments were made on the loan on or

before the Maturity Date, October 19, 2002. It is further undisputed that, in the months following the Maturity Date, beginning in November 2002 and ending in May 2003, NDC made payments to Ginsberg totaling $59,325. Despite NDC's evident default on the loan, insofar as no payment was made on or before the Maturity Date, Ginsberg took no action to reduce the indebtedness to judgment or to seek any judicial or other remedy whatsoever.

As of May 2003, NDC successfully arranged to refinance the loan, but as a result of the parties' dispute over the amount due and owing to retire the loan, NDC filed this declaratory judgment action; the loan remains unpaid. The parties' dispute is straightforward. NDC contends that the total amount due and owing on the loan, under its "plain language" interpretation of the loan documents, including the provision quoted above, is properly calculated by adding the principal loan amount ($750,000) to the Lump Sum Payment ($100,000), adding interest at the rate of 30% per annum from the Maturity Date to the date of the payment(s) of any and all amounts due, while subtracting the payments made after the Maturity Date.[2]

Ginsberg disagrees that the total amount due and owing on the loan is properly calculated in this manner. Rather, Ginsberg apparently contends, there must surely be some consequence inhering in NDC's "multiple defaults." *See* Ginsberg's Opposition to Motion for Summary Judgment,

---

[2] NDC's calculation could be read to suggest that it should be permitted to avoid any interest accruals on the $59,325 it paid between November 2002 and May 2003. This would be incorrect; interest should accrue at the agreed 30% rate on all such periodic payments until the date each was made. I proceed on this understanding of NDC's calculation of the amount due and owing.

Exh. at 1. In other words, Ginsberg seems to contend that the $100,000 Lump Sum Payment constitutes a form of "discount" provided to NDC on the otherwise applicable costs of the loan, conditioned on NDC's compliance with the loan agreement, i.e., its timely payment of the loan principal and the Lump Sum Payment by the Maturity Date. In light of NDC's default, therefore, Ginsberg would apparently charge 30% interest *retroactive to the date of the loan,* rather than effective on the day after the Maturity Date. It appears, then, that the difference in the parties' respective calculations of the amount due and owing as of June 12, 2003, the date NDC tendered payment to Ginsberg, is approximately $112,000.

The problem with Ginsberg's contention, of course, is that the parties' agreement says no such thing. The agreement is clear and unambiguous. I agree with NDC that Ginsberg's belated attempt to reform the Loan Agreement is unavailing. Accordingly, judgment shall be entered declaring the rights of the parties and enjoining Ginsberg from impeding NDC's efforts to retire its indebtedness under the Loan Agreement.[3]

---

[3] Ginsberg makes a spurious contention that because NDC provided an underlying mortgage on real property in Maryland as security for the loan, a dispute of material fact exists as to the "ownership" of the mortgage. The record makes indisputably clear, however, that Ginsberg was provided with a security interest in the mortgage. Furthermore, to the extent that Ginsberg contends that he is entitled to discovery, the affidavit submitted by counsel falls woefully short of the requirements of Fed.R.Civ.P. 56(f). Accordingly, no discovery is necessary or appropriate, and Ginsberg's failure to file an answer to the complaint (he filed the misguided 12(b) motion discussed above) does not foreclose summary judgment at this stage of the case.

Filed: September 2, 2003

/s/_____
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

No. AMD 03-1552

[Filed September 2, 2003]

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE, Plaintiff	)
v.	)
MORTON L. GINSBERG, Defendant	)

JUDGMENT ORDER

In accordance with the foregoing Memorandum Opinion, it is this 2nd day of September, 2003, by the United States District Court for the District of Maryland, ORDERED, ADJUDGED, and DECREED

(1) That Defendant's motion to dismiss is DENIED; and it is further ORDERED

(2) That Plaintiff's motion for summary judgment is GRANTED; and it is further ORDERED

(3) That the proper pay-off amount under the indebtedness owed by Plaintiff to Defendant is to be calculated as follows: by adding the principal loan amount ($750,000) to the "Lump Sum Payment" ($100,000), adding interest at the rate of 30%

per annum from the Maturity Date to the date of the payment(s) of any and all amounts due, while subtracting the payments made after the Maturity Date; and it is further ORDERED

(4) That Defendant has only a security interest in the Collateral Mortgage and that, upon payment of the pay-off figure as calculated above, the Collateral be released; and it is further ORDERED

(5) That interest accruals on the unpaid balance of the indebtedness shall cease as of June 12, 2003, and no interest shall be assessed after that date; and it is further ORDERED

(6) That Defendant is enjoined from commencing, maintaining, or prosecuting any action at law or in equity, in any court, for the purpose of reducing to judgment the indebtedness owed by Plaintiff to Defendant or for the purpose of foreclosing on any of the security transferred to Defendant in respect to the indebtedness owed by Plaintiff to Defendant; and it is further ORDERED

(7) That in all other respects, and specifically as to the breach of contract counts of the Complaint, the Complaint is dismissed without prejudice; and it is further ORDERED

(8) That any and all prior rulings made by this Court disposing of any claims against any parties are incorporated by reference herein and this order shall be deemed to be a final judgment within the meaning of Fed. R. Civ. P. 58; and it is further ORDERED

(9) That the motion to file surreply (Paper No. 14) is GRANTED; AND IT IS FURTHER ORDERED

(10) That the Clerk shall CLOSE THIS CASE.

/s/_____
ANDRE M. DAVIS
UNITED STATES DISTRICT JUDGE

(2) (2)

Nos. 04-551 and 04-552

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAVID F. ALBRIGHT,

Petitioner,

v.

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,

Respondent.

MORTON L. GINSBERG,

Petitioner,

v.

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	5
1. The Petitions should be denied because the lower court has not "far departed from the accepted and usual course of judicial proceedings."	5
2. The Petitions should be denied because the lower court decisions do not conflict with this Court's precedent	7
3. Albright's Petition should be denied because he has failed to present a compelling reason for this Court to review the sanction order issued by the district court and upheld on appeal upon a finding that Petitioners' arguments were frivolous and spurious	11
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

Beller & Keller v. Tyler, 120 F.3d 21 (2d Cir. 1997) 7

Hanna v. Plumer, 380 U.S. 460 (1965) 9, 10, 11

Wade v. Danek Medical, Inc., 182 F.3d 281 (4th Cir. 1999) 8, 11

Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 8, 9, 10, 11

CONSTITUTION

U.S. Const. art. I 9

RULES

Fed. R. Civ. P. 3 ..... 8, 9

Fed. R. Civ. P. 4(e) 6

Fed. R. Civ. P. 4(f) 10

Fed. R. Civ. P. 4(k)(1) 3, 7, 8

Fed. R. Civ. P. 11 4

Fed. R. Civ. P. 12(a) ..... *passim*

Fed. R. App. P. 38 5

Sup. Ct. R. 10 12

Maryland Rule 2-321(b) 3, 10

STATUTES

Rules Enabling Act, 28 U.S.C. § 2072 ..... 9, 10

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIALS

Fed. R. Civ. P. 4(k), Advisory Committee's Note 8

Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure, 127 F.R.D. 237 (1989) *rule published in final form*, 146 F.R.D. 401 (1993) 6

INTRODUCTION

Respondent, Neighborhood Development Collaborative ("NDC"), a non-profit provider of affordable rental housing, by its undersigned counsel, submits this Brief in Opposition to Petitions for Writ of Certiorari opposing two related Petitions for Writ of Certiorari filed, respectively, by Petitioners Morton L. Ginsberg ("Ginsberg") and David F. Albright ("Albright").

Petitioners assert that the Court should review the decisions of the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit, which among other findings rejected Petitioner Ginsberg's claim that the summons issued in this case was deficient and thus denied his motion to dismiss. Petitioners claim that the lower court decisions conflict with relevant decisions of this Court and "so far depart" from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

The Petition should be denied because the lower courts properly found that the summons served on Ginsberg complied with Fed. R. Civ. P. 12(a), which requires that an answer be filed within 20 days of service of process, and did not need to provide the 60-day response period that would have applied had this diversity of citizenship action been filed in state court. Moreover, the lower court decisions are consistent with this Court's precedent.

STATEMENT OF THE CASE

The record shows that on April 19, 2002, NDC borrowed $750,000 from Ginsberg pursuant to a Loan Agreement and a Promissory Note having a maturity date of October 19, 2002 (the "Loan"). J.A. 56-60. The Promissory Note provides that NDC was to pay Ginsberg on the maturity date the principal amount, plus $100,000 as a "lump sum payment of all interest, loan fees and costs." J.A. 59 (emphasis added). The Promissory Note further provides that

> [f]rom the *day after* the maturity of this Note until paid in full, the Borrower [NDC] shall pay to the Lender [Ginsberg] upon demand by the Lender interest on the unpaid balance of the Principal Amount at the per annum rate of interest equal to thirty percent (30%) per annum.

Id. (emphasis added).

NDC was unable to pay off the Loan at maturity and Ginsberg declared a default. J.A. 64. During the Spring of 2003, NDC sought a payoff figure from Ginsberg so that it could pay off the Loan. J.A. 65. Ginsberg refused to provide a payoff figure consistent with the express terms of the loan documents, insisting instead that he was owed $146,455 more than the loan documents required. *Id.*

As of June 12, 2003, the proper payoff figure for the Loan pursuant to the express terms of the Promissory Note and Loan Agreement was $955,552. J.A. 65. NDC offered to pay this sum to Ginsberg in exchange for a release of Ginsberg's lien, but Ginsberg refused. J.A. 65-66. Faced with Ginsberg's refusal to accept a payoff amount that comported with the terms of the loan documents, NDC filed this declaratory judgment action. J.A. 4.

Ginsberg moved to dismiss the complaint, claiming that the court lacked personal jurisdiction over him. J.A. 4, 26-28. Among other arguments, Ginsberg claimed that the summons was deficient because it required that he serve a responsive pleading within 20 days of service, as mandated by Fed. R. Civ. P. 12(a). Specifically, Ginsberg asserted that Fed. R. Civ. P. 4(k)(1)(A) requires that in a diversity action such as this, where a defendant is served outside Maryland, the defendant should be permitted 60 days to answer the complaint, as provided in Maryland Rule 2-321(b), instead of 20 days as required by Rule 12(a). Further, Ginsberg asserted that because the summons provided that an answer was required to be filed within 20 days, service and process were deficient and thus the district court lacked personal jurisdiction. *Id.*

NDC filed a motion for summary judgment on July 17, 2003. J.A. 5. In that motion, NDC argued that the Loan Agreement and Promissory Note provided a clear and unambiguous formula for calculating the payoff amount, and resulted in a payoff figure of $955,552. J.A. 48-54. Ginsberg opposed the motion, arguing that the $100,000 lump sum payment constituted a form of "discount" on the otherwise applicable costs of the Loan, which was conditioned on NDC timely paying off the Loan by the maturity date. J.A. 72. In light of NDC's payment default, Ginsberg claimed that the 30% default interest rate should be charged retroactively to the date of the Loan, not from the date of the default. *Id.*

On September 3, 2003, the district court denied Ginsberg's motion to dismiss, describing Ginsberg's insufficient process claim as "frivolous." J.A. 107. On the merits, the district court granted summary judgment in favor of NDC, holding that the Loan Agreement and

Promissory Note were clear and unambiguous, and provided a payoff figure in accordance with NDC's calculation. J.A. 105. The court rejected Ginsberg's "discount" argument, stating that "[t]he problem with Ginsberg's contention, of course, is that the parties' agreement says no such thing." J.A. 105.

On October 16, 2003, NDC filed a post-judgment motion for sanctions under Fed. R. Civ. P. 11, seeking sanctions against Ginsberg, Albright, and Albright & Goertemiller, LLC. J.A. 7, 153-166. The district court granted in part and denied in part the motion for sanctions. J.A. 228. While the court declined to award attorneys' fees as a monetary sanction, the court reprimanded Ginsberg's attorneys, stating:

> Not only do I adhere to my previously-expressed view that much of defendant's contentions in this peculiar case were "frivolous" and "spurious," even more fundamentally, I find defense counsel's performance in this case is, with all due respect, an embarrassment to him, his firm and his client. In my view, under the unique circumstances presented here, this finding is an adequate "sanction."

J.A. 228. The district court added: "I note that [Ginsberg] has taken an appeal; I presume that [NDC] will seek sanctions from the Fourth Circuit. From the perspective of this court, monetary sanctions on appeal would certainly be appropriate." *Id.*

Ginsberg and Albright appealed separately. These appeals were consolidated on motion by NDC, and the Fourth Circuit issued a one-paragraph *per curiam* opinion

affirming the district court's decision.[1] NDC filed a motion for sanctions under Fed. R. App. P. 38, which is fully briefed and pending in the Fourth Circuit.

REASONS FOR DENYING THE WRIT

The Petitions should be denied for several reasons. First, the lower courts did not depart from the accepted and usual course of judicial proceedings. Rather, they properly found that the summons served on Ginsberg complied with the express requirements of Fed. R. Civ. P. 12(a). Second, the decisions below do not, as Petitioners claim, conflict with a relevant decision of this Court. Finally, Petitioners have asserted no compelling basis for reviewing the lower court's sanction order.

1. The Petitions should be denied because the lower court has not "far departed from the accepted and usual course of judicial proceedings."

Petitioners claim that the lower court has "far departed from the accepted and usual course of judicial proceedings" by requiring Ginsberg – an out of state defendant served with a complaint filed in the District of Maryland based on diversity of citizenship – to respond to the complaint within 20 days after service, rather than the 60-day response time he would have received had the case been filed in a Maryland state court. This claim has no merit.

[1] On December 15, 2003, while these appeals were pending, NDC paid Ginsberg $955,582 (the payoff amount the district court determined was owed) and Ginsberg released his lien.

Rule 12(a)(1) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[u]nless a different time period is prescribed in a statute of the United States, a defendant shall serve an answer . . . within 20 days after being served with the summons and complaint." Where, as here, no statute prescribes a different time period to answer, Rule 12(a) is susceptible to only one possible interpretation – that a defendant in a case such as this is afforded only 20 days to respond to a complaint. This is true irrespective of whether service is effected pursuant to federal or state law, and whether the case is based on federal question or diversity jurisdiction.

Rule 12(a) once provided explicitly for an extended answer period if service was effected under state law. Before being amended in 1993, Rule 12(a) stated, in pertinent part, that "[a] defendant shall serve an answer within 20 days after the service of the summons and complaint upon the defendant, *except when service is made under Rule 4(e) [permitting service pursuant to state law] and a different time is prescribed . . . in the statute or rule of court of the state.*" Fed. R. Civ. P. 12(a) (1992) (emphasis added).

The language permitting courts to borrow time periods from state law, however, was eliminated in the 1993 amendment to Rule 12(a). In purging this language, the Advisory Committee on Civil Rules explained that it sought "nationwide uniformity with respect to the form and content of a summons." *See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure*, 127 F.R.D. 237, 306-03 (1989), *rule published in final form*, 146 F.R.D. 401 (1993) (noting that "[s]ubdivision (a) [of Rule

12] is amended to strike the reference to state law with respect to the time for answer").

Because the relief sought by Petitioners contradicts the plain language of Rule 12 (a fact ignored in the Petitions), Petitioners' claim that the lower court has "far departed from the accepted and usual course of judicial proceedings" is specious.

2. The Petitions should be denied because the lower court decisions do not conflict with this Court's precedent.

This Court has not considered whether the unambiguous 20-day response period in Rule 12(a) may be avoided in a diversity action. Moreover, the one circuit to address this issue has rejected the notion that a defendant who is served pursuant to a state law method of service can exceed the 20-day response time set forth in Rule 12(a), even where the state law provides a longer time in which to answer. *See Beller & Keller v. Tyler*, 120 F.3d 21, 25-26 (2d Cir. 1997) (rejecting claim that default judgment was void because it was entered before the time to answer had expired, and finding that while the Federal Rules authorize the use of a state's "nail and mail" method of service, they do not permit a defendant to borrow the response times included in the state law).

Nevertheless, ignoring the plain language of Rule 12(a), the 1993 amendment to that rule, and the *Beller & Keller* decision, Petitioners claim that Fed. R. Civ. P. 4(k)(1)(A) mandates that he should have been given 60 days to respond to the complaint, and that the lower court decisions contradict decisions of this Court interpreting Rule 4(k)(1). However, neither the language of Rule 4(k)(1)

nor this Court's precedent supports Petitioners' contention.

Rule 4(k)(1) provides, in pertinent part, that "[s]ervice of a summons . . . is effective to establish jurisdiction over the person of a defendant (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." The notes of the Advisory Committee on Civil Rules provide that Rule 4(k)(1) "explicitly authoriz[es] the exercise of personal jurisdiction over persons who can be reached under state long-arm law, the '100-mile bulge' provision added in 1963, or the federal interpleader act." Fed. R. Civ. P. 4(k), Advisory Committee's Note.

Although Rule 4(k)(1) authorizes personal jurisdiction over defendants such as Ginsberg who can be reached under a state long-arm statute, this rule does not specify a time period for service that must be followed to effectuate jurisdiction. Neither the text of Rule 4(k)(1), nor the Advisory Committee's note, references any service or process requirements. There simply is no basis in the text of Rule 4(k), or elsewhere, for arguing that this rule mandates application of Maryland's 30-day response period. Indeed, as noted above, this argument directly contradicts the plain language of Rule 12(a).

Petitioners claim that the lower court decisions contradict this Court's decision in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), as well as the Fourth Circuit's decision in *Wade v. Danek Medical, Inc.*, 182 F.3d 281 (4th Cir. 1999). This simply is not so.

In *Walker*, this Court considered whether Fed. R. Civ. P. 3 conflicted with an Oklahoma statute that required service of process to be effected before the statute of

limitations would be tolled. 446 U.S. at 748-49. Petitioners claim that the *Walker* court "determined that the State's rule as to when a case commences would control and override Federal Rule 3." Ginsberg Petition at 4; Albright Petition at 4. Petitioners have misstated the holding in *Walker*. In fact, *Walker* supports the district court's holding that Rule 12(a)'s 20-day answer period controls.

Walker addressed a situation where federal and state rules were *not* in direct conflict.[2] Here, Rule 12(a) and the Maryland rule that provides 60 days to answer a state court lawsuit are in direct conflict because the time by which an answer must be filed is expressly addressed in both rules. Under this circumstance, *Walker* makes clear that an analysis must be performed under *Hanna v. Plumer*, 380 U.S. 460 (1965). *Id.* at 748.

In *Hanna*, this Court explained that where a federal rule is clearly in conflict with a state rule, the federal rule applies so long as it is within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and within a constitutional grant of power such as the Necessary and Proper Clause of Article I of the United States Constitution. 380 U.S. at 470-72.

Petitioners have made no effort to show, and cannot show, that Rule 12(a) does not meet these requirements. The Rules Enabling Act authorizes this Court to "prescribe general rules of practice and procedure . . . in the

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[2] Noting that "Rule 3 simply states that '[a] civil action is commenced by filing a complaint with the court,'" the *Walker* court found that "[t]here is no indication that the Rule was intended to toll a state statute of limitations." *Id.* at 750. The *Walker* court thus concluded that the federal and state rule "each controll[ed] its own intended sphere of coverage without conflict." *Id.* at 752.

United States district courts," provided such rules do "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a) and (b). The test for compliance with the Rules Enabling Act and the Constitution does not require that a rule be outcome-neutral (i.e., that it affect no rights of the litigants). As the *Hanna* court stated:

> "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. The fact that the application of Rule 4(f) will operate to subject petitioners' rights to adjudication by the district court . . . will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights."

Id. at 464-65 (quoting *Mississippi Pub. Corp. v. Murphee*, 326 U.S. 438, 445-46 (1946) (assessing the validity of Fed. R. Civ. P. 4(f) under the Rules Enabling Act) (internal citations deleted)).

Rule 12(a), which merely provides a time period (20 days) within which an answer must be filed, is undeniably a "general rule of practice and procedure" within the meaning of the Rules Enabling Act. Accordingly, under the *Hanna/Walker* analysis described above, Rule 12(a) applies over a conflicting state court rule of procedure such as Maryland Rule 2-321(b) in a federal diversity action such as this.

Wade v. Danek Medical, Inc., 182 F.3d 281 (4th Cir. 1999), also is inapposite. In *Wade*, the Fourth Circuit held that Virginia's rule against equitable tolling, rather than the federal rule, applied. *Id.* at 290. Relying in part on *Walker*, the *Wade* court reasoned that "in any case in which a state statute of limitations applies – whether because it is borrowed in a federal question action or because it applies under *Erie* in a diversity action – the state's accompanying rule regarding equitable tolling should also apply." *Id.* at 289. The *Wade* holding is relevant only to rules that constitute "'an integral part of the statute of limitations.'" *Id.* at 288 (quoting *Walker*, 446 U.S. at 753). Rule 12(a) is not such a rule.[3]

3. Albright's Petition should be denied because he has failed to present a compelling reason for this Court to review the sanction order issued by the district court and upheld on appeal upon a finding that Petitioners' arguments were frivolous and spurious.

Petitioner Albright contends that his Petition should be granted because "the sanctions must be vacated" "upon a showing that said jurisdictional arguments are not frivolous." Albright Petition at 5. For the reasons explained above, however, the district court "got it right" when it rejected Petitioners' substantive arguments below,

[3] Without discussion, Petitioners assert that failing to review the lower court decisions will encourage forum shopping. This claim is meritless. This Court in *Hanna* noted that a procedural rule that does not "wholly bar recovery" but rather only results in procedural differences such as the manner in which process is served has "scant, if any, relevance to the choice of a forum." 380 U.S. at 469. Rule 12(a) is such a rule.

finding them to be "frivolous" and "spurious." Moreover, asserting that a lower court decision was incorrect, even if true, is not a "compelling reason" to grant a petition for a writ of certiorari, which is "rarely granted when the asserted error consists of erroneous factual findings." *See* Sup. Ct. R. 10.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Petitions for a Writ of Certiorari filed by Petitioners be denied.

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